

IE: Smoky Mountain
BREAK: 47.7
OTHER: V3

Will was
filed in
CNTY clerk's
office, but
never probated.

Westlaw.

1987 WL 6082

Not Reported in S.W.2d, 1987 WL 6082 (Tenn.Ct.App.)

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee, Western Section, at
Jackson.

Joe HARE, Plaintiff/Appellant,

v.

V.B. RHODES and June Hare Rhodes,
Defendants/Appellees.

Feb. 6, 1987.

Henderson Equity No. 3, No. 4920, Hon. Joe C.
Morris, Chancellor.

Ricky L. Wood, Parsons, for plaintiff/appellant.

Bill R. Martin, Lexington, for defendants/appellees.

TOMLIN, Presiding Judge, Western Section.

*1 Plaintiff brought suit in the Chancery Court of Henderson County, seeking to set aside a deed from his father to his half-sister and her husband (herein "defendants") on the grounds of fraud, undue influence and lack of consideration. Prior to trial, the chancellor allowed plaintiff to amend his complaint so as to allege fraudulent concealment. Defendants plead, among others, the statute of limitations as a defense. In a nonjury trial, the chancellor granted defendants' motion to dismiss at the conclusion of plaintiff's proof. The principal issue presented by this appeal and which is dispositive thereof is whether the proof preponderates against the chancellor's finding that there was no fraudulent concealment on the part of defendants. For the reasons stated, we affirm the chancellor's decree.

Plaintiff and Mrs. Rhodes, one of the defendants, are half-brother and sister, being the children of Thomas Hare by two different wives. In 1962, Thomas Hare inherited a family farm from his brother. It consisted

of approximately 400 acres and was subject to a life estate of their mother. At that time and for several years prior thereto, Thomas Hare was unable to work because of a physical disability. He suffered from tuberculosis and alcoholism. He was financially unable to assume the balance of the mortgage on the farm in the amount of \$5,725. Martin Hare left no other assets with which to pay the debt.

Shortly thereafter, Thomas Hare persuaded defendants to take title to the farm. In so doing defendants agreed to assume the balance of the mortgage and the debts of Thomas Hare's deceased brother Martin. The deed conveying the farm to defendants was recorded in the Register's Office of Henderson County shortly after its execution. Defendants have resided on the farm since 1963.

Thomas Hare died in 1965. Although he left a will which bequeathed his entire estate to defendant Mrs. Rhodes, except for the sum of \$25.00 which he left to plaintiff, the will was never probated since he had no estate. Mrs. Rhodes did, however, cause the will to be filed in the county court clerk's office the following year.

Thomas Hare and plaintiff's mother were divorced in 1957, the year of his birth. Plaintiff testified that he had seen his father only once during his entire lifetime and that was when he was only five years of age. There had been no other contact of any type between plaintiff and his father. Plaintiff did not meet his half-sister until he was approximately sixteen years of age. She introduced herself to him while he was a patient in the local hospital.

Plaintiff testified that in 1981 various individuals asked him if he had inherited anything from his father's estate. Plaintiff subsequently acquired a copy of the deed conveying the farm from his father to defendants and employed counsel to "investigate" the matter. However, his lawyer did nothing. He later employed other counsel.



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In his original complaint, plaintiff alleged fraud and undue influence on the part of defendants, as well as a lack of consideration in seeking to have the deed set aside. Defendants filed a motion to dismiss on the ground that plaintiff's action was barred by the applicable statute of limitations, T.C.A. § 28-2-102. At a hearing on the motion to dismiss, the chancellor ruled that the allegations of fraud and undue influence were barred by the statute of limitations. However, the court allowed plaintiff to amend his complaint to allege fraudulent concealment such as might toll the running of the statute. Plaintiff's first amendment read in part as follows: "Plaintiff states ... the Defendants fraudulently concealed the conveyance so as to prevent discovery of the conveyance." The court subsequently advised plaintiff that his first amendment was not sufficient to allege acts or actions that constituted fraudulent concealment. The chancellor allowed plaintiff to further amend his complaint. Plaintiff's second amendment was as follows:

*2 That the Defendant, June Hare Rhodes, being the only direct heir of adult age, to the parties' father at the time of his death, was under a duty and obligation to disclose the conveyance referred to in the original Complaint, to the Plaintiff and, that she intentionally withheld this information from him by refusing to probate his father's estate knowing if the estate was probated [sic] the conveyance would be brought to light and the inequity revealed.

Defendants' subsequent motions to dismiss were denied.

Inasmuch as this case was tried by the chancellor without the intervention of a jury, our review is *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of the chancellor. Absent an error of law, unless the proof preponderates against these findings, we must affirm. Rule 13(d), T.R.A.P.

In his argument before this Court, counsel for plaintiff conceded that if plaintiff could not prove fraudulent concealment on the part of defendants, then this case was barred by the statute of limitations. Such a concession is a frank recognition of the chancellor's

earlier ruling that, but for fraudulent concealment on the part of defendants, his allegations of fraud and undue influence would be barred. Counsel for plaintiff was also recognizing that the threshold issue is whether or not plaintiff had established by a preponderance of the evidence an act or acts of fraudulent concealment on the part of defendants.

In our opinion, plaintiff has presented no proof at all that would reflect upon the conduct of defendants. To the contrary, his proof absolves them of any fraudulent acts or wrongdoing. On cross-examination by defendant's counsel, the following question was put to plaintiff:

Q. At any time did Mr. or Mrs. Rhodes do anything to misrepresent the situation to you in anyway?

A. Not that I know of.

Everything that defendants did appears to be in proper order. Testimony as to the insolvency of the parties' father at the time defendants took title to the farm is uncontradicted. They paid off the mortgage as well as assuming their uncle's debts. The deed conveying title to the farm to them was timely recorded. They had been in open possession of the farm for nine years when plaintiff attained his majority. The explanation for the failure to probate Thomas Hare's will was reasonable and plausible. Nonetheless, the will was filed of record shortly after his death in 1966, some six years before plaintiff attained his majority. In our opinion, our Supreme Court in Vance v. Schulder, 547 S.W.2d 927, 930-31 (Tenn.1977) clearly set forth the law applicable to the case at bar:

"Mere ignorance and failure of the plaintiff to discover the existence of a cause of action is not sufficient to toll the running of the statute of limitations. Hall v. DeSaussure, [41 Tenn.App. 572, 297 S.W.2d 81 (1956)], and numerous cases. There is an exception to this rule. Fraudulent concealment of the cause of action by the defendant tolls the statute of limitations. It begins to run as of the time of the discovery of the fraud by the plaintiff. Boro v. Hidell, 122 Tenn. 80, 120 S.W. 961 (1909); Bodne v. Austin, [156 Tenn. 353, 2 S.W.2d 100 (1928)]; Howell v. Davis, [43 Tenn.App. 52, 306

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S.W.2d 9 (1957)]; and numerous cases. To come within this exception, the plaintiff must prove that the defendant took affirmative action to conceal his cause of action and that he, the plaintiff, could not have discovered his cause of action despite exercising reasonable diligence. Redwood v. Raskind, 49 Tenn.App. 69, 350 S.W.2d 414 (1961); Hudson v. Shoulders, 164 Tenn. 70, 45 S.W.2d 1072 (1932); Woodfolk v. Marley, 39 S.W. 747 (Tenn.Ch.App.1896), aff. 98 Tenn. 467, 40 S.W. 479 (1897); Patten v. Standard Oil Co. of Louisiana, 165 Tenn. 438, 55 S.W.2d 759 (1933); Ray v. Scheibert, 224 Tenn. 99, 450 S.W.2d 578 (1959); see 51 Am.Jur.2d, Limitations of Actions, § 148 pp. 719-720."

*3 In our opinion, plaintiff's proof totally fails to place him within the noted exception. His suit is barred by the statute of limitations. We do not reach the merits of plaintiff's claim. If we were to do so, we would likewise be compelled to conclude that plaintiff failed to sustain any of his allegations by a preponderance of the proof.

The decree of the chancellor is affirmed. Costs in this cause are taxed to plaintiff, for which execution may issue, if necessary.

TOMLIN, P.J. (W.S.), and HIGHERS, J., and MATHERNE, Special Judge, concur.

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